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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 510

JOSEPHINE LEONARD,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Tenth Circuit

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TO: The Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States.

JUDGMENT SOUGHT TO BE REVIEWED

Petitioner Josephine Leonard respectfully petitions for Writ of Certiorari to review the judgments against her in the United States District Court for the District of Wyoming, and in the Tenth Circuit Court of Appeals.

The opinions are reported in 131 Fed. Supp. 694 and 235 Fed. 2nd 330. Copy of the Circuit Court Opinion is appended. The District Court opinion begins on page 7 of this Transcript of Record filed herewith.

JURISDICTIONAL STATEMENT

The judgment of the Tenth Circuit sought to be reviewed was entered June 23, 1956. No rehearing was requested, and an extension of time within which to petition for Certiorari was granted extending said time to October 22, 1956.

Jurisdiction to review the judgment in question is conferred upon this Court by 28 U.S.C.A., § 1254, (1).

QUESTIONS PRESENTED

1. May an Air Force soldier on duty with an R.O.T.C. detachment be acting "in line of duty" under the Federal Tort Claims Act when driving a government vehicle to and from his detachment and its nearest regular military installation during duty hours with valid trip ticket and with express authority of his commanding officer, for the purposes of obtaining post exchange items and for appearing before Air Force administrative boards in pursuance of his voluntary application for Officer Candidate Training, and in compliance to a written request from a superior to appear before such boards?

2. Are Medical Examination Boards and Officer Candidate Boards of the Air Force so removed from the authorized functions of the Armed Forces that a soldier who carries out a written request of a superior to appear before them is no longer acting in "line of duty" under the Federal Tort Claims Act?

3. By Wyoming law of respondeat superior, is not a

soldier acting "in line of duty" under the Federal Tort Claims Act when driving a government vehicle during duty hours with valid trip ticket performing a similar thing done on prior occasions, at which time all his superior officers maintained the same supervision, direction and control of his activities as on prior occasions?

STATUTES INVOLVED

The statutes involved herein are as follows:

28 U.S.C. § 1346, 62 Stat. 933, Amended 63 Stat. 62, 63 Stat. 101:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C., Sec. 2671, 62 Stat. 982, amended 63 Stat. 106:

" 'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty."

28 U.S.C., Sec. 2674, 62 Stat. 983:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

STATEMENT OF THE CASE

This action was brought by Josephine Leonard in the District Court of the United States for the District of Wyoming under the Federal Tort Claims Act 28 U.S.C. § 1346, 2671 et seq.

On July 1, 1953, Josephine Leonard was driving eastward on U.S. Highway 30 in Wyoming. The only other occupant of her car was her fourteen year old daughter, Cora Mae Leonard. About thirteen miles east of Laramie, Wyoming, her car collided with a United States Air Force staff car driven westward by Sergeant Fred S. Williams, causing the death of her daughter and inflicting upon her serious permanent physical injuries.

Sergeant Williams was a United States Air Force enlisted man assigned to the Reserve Officer Training Corps detachment stationed on the campus of the University of Wyoming at Laramie, Wyoming. For logistics and finance, this detachment was supported by the facilities at Warren Air Force Base, Cheyenne. Approximately twice a month for a long period prior to the accident his duties included driving from Laramie to Cheyenne and back. His testimony revealed that in May, 1953, his commanding officer received orders from R.O.T.C. Headquarters in Montgomery, Alabama, to the various schools directing that eligible enlisted men be queried for officer training. He admitted that there was a need

at the time for air observers—formerly called Navigation Officers—in the Air Force, and that following a discussion with his commanding officer he voluntarily made application for Officer Candidate Training.

The policy of the detachment was that the commanding officer would telephone Warren A.F.B. hospital near Cheyenne, a distance of fifty miles, to make appointment for the enlisted personnel scheduled for Officer Candidate Training. Such a procedure took place in this case, and Sergeant Williams, with the express authority of his commanding officer and with a valid trip ticket for this purpose, then drove this same vehicle to Warren A.F.B. from Laramie and submitted to the various examinations.

The commanding officer testified that his unit was located fifty miles from the nearest air installation, and that he felt his people were entitled to the privileges afforded by that base and therefore if the detachment had official business to transact in Cheyenne, he testified that he had no objection to personal matters like making purchases at the post exchange, being taken care of in conjunction with official business.

Sergeant Williams drove the same staff car on similar trips to the same destination "frequently," and always with express authority of his commanding officer and with his knowledge that in addition to performing the official business of each particular trip, the Sergeant or driver would pick up post exchange supplies and perform other errands for the personnel of his detachment in Laramie.

Following Sergeant Williams' first regular physical examination, he received a written notification from a captain in higher echelon located at Lowry A.F.B. near Denver, to the effect that his application had been returned to Warren A.F.B. because of "physical reasons."

The Sergeant was then requested in writing by another Captain to return to Warren A.F.B. at his convenience to have these defects taken care of.

Upon receipt of this latter request Sergeant Williams exhibited it to his commanding officer and again drew a valid trip ticket as was his custom and proceeded to prepare for his trip to Cheyenne, Wyoming.

He further stated that someone over him, he believed it was his commanding officer, had made an appointment for him for the day of the accident at Warren A.F.B. hospital. He said he knew this appointment had been made for him and he felt that it was his duty to keep it. His Sergeant Major, two grades above him in rank, knowing that he was driving the official vehicle to Cheyenne with permission of the commanding officer, told him to pick up an insurance policy in downtown Cheyenne.

At 7:00 a.m. July 1, 1953, Sergeant Williams checked out his government vehicle and drove it to Warren A.F.B. where he again fulfilled his appointment at the base hospital. He then appeared before the officer candidate board, made his supply purchases at the P.X. for other members of the detachment, and killed time waiting for the insurance policy that was not yet ready in downtown Cheyenne. He had not been ordered to return at any particular time that day. When the policy was completed he received it and returned from Cheyenne to Laramie on the direct route which he had taken that morning. The accident occurred at approximately 5:45 p.m.

The trial court held that Sergeant Williams was engaged "on a mission of his own," and "in the furtherance of his own personal business," and therefore was not acting within scope of his employment or "in line of duty" within definition of the Federal Tort Claims Act.

Petitioner duly appealed to the Tenth Circuit Court of Appeals. The appeal was summarily rejected.

I

REASONS AND ARGUMENT FOR ISSUANCE OF WRIT

1. THE COURT OF APPEALS HAS RENDERED AN ERRONEOUS OPINION ON AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL, AND ITS DECISION VIOLATES THE EXPRESS TERMS AS WELL AS THE SPIRIT OF THE FEDERAL TORT CLAIMS ACT.

The most compelling reason for the issuance is to permit review of the proposition that a soldier must have been directly ordered to do a specific thing at the time and place out of which grew a cause of action for his commission of an alleged tort. The opinion holds that Williams was not *ordered* by higher authority to travel to Cheyenne for a physical examination, but was merely *requested* to do so. This is raising a military distinction in civil law, where it has no place. It may bear on purely military Courts-Martial proceedings, but it is erroneous as the decisive test when liability is to be determined by the doctrine of respondeat superior.

Your petitioner feels the Circuit Court opinion was a test of liability according to Army practices, not under the Federal Tort Claims Act. It summarily begins its treatment of the liability issue by stating that in its examination of Wyoming cases it found none in which liability is imposed on a principle for the negligent act of his agent "when the latter was in the furtherance of his personal business, or to use the language of the learned trial court on a 'mission of his own.' " As its sole authority it looked no farther than the two existing Wyoming cases, and did not apply general tests of respondeat superior which these decisions approved. With the exception of the *Williams* case, 350 U.S. 857, cited only as to which law applies, it failed to discuss or distinguish a single Federal Tort Claims Act decision in determining

whether or not Williams was in fact on a "mission of his own," nor did it bother to exert thought on the possibility that Williams' business may have been also the government's business.

Evidence shows that recruiting, examining and accepting of cadets for Officer Candidate Training in the Armed Forces is very much the government's business, particularly when the applicant is a soldier. To this petitioner the Court of Appeals states a falsehood and sets up a double standard of morality—one for the Armed Forces and quite another for the Judiciary—when it holds that the government has no business or interest in an application for Officer Training upon which it specifically and in writing requests a *second* physical examination. But the Court of Appeals states that this Armed Force official correspondence from a Captain to a Sergeant, through channels in clearly franked mail, was a request, and not an order, and was informative only.

With military personnel involved, in numerous instances in which the language "on his own" applies, the Armed Forces person involved was on leave, or pass, or furlough, or otherwise off-duty. This was not the case with Williams. He was on full duty time. No attempt was made to distinguish these cases. They were ignored. *United States v. Sharpe*, 189 F. 2d 239; *United States v. Williamson*, 90 U.S. 411; *Foster v. United States*, 43 Court of Claims, 170. In fact the very words of the trial court "on his own" are from *Rutherford v. United States*, 73 Fed. Supp. 867, affirmed per curiam in 168 F. 2d 70, 6-Cir., in which a Navy petty officer was off-duty. Cf *U.S. v. Lushbaugh*, 200 F. 2d 717.

In other Federal cases cited to the Circuit Court below, also ignored in its opinion, recovery was denied, for reasons clearly distinguishable from the case at bar, although the tort-feasor was on duty. Thus in *United States*

v. Eleazer, 177 F. 2d 914, the Marine involved was on delay-en-route and was driving his own automobile. Unlike the instant case, the instrumentality was not under the control of the master. The "control" test of respondeat superior was applied in the *Eleazer* case, supra. But the Circuit Court failed to apply it in the instant case, holding stubbornly to its position that a request is not an order. It ignored fact that on the day of the accident the government had not relaxed in one iota its degree of control, supervision, or direction over Williams exercised on prior trips to the same destination for reasons identical as on the day in question.

The opinion states "the record is entirely devoid of any evidence indicating an order or an instruction given Williams by his superior officers or his Commanding Officer requiring the purchasing of goods at the PX or to pick up the automobile collision and liability policy for his fellow enlisted man[1]." *We submit the law is that an order or instruction to do these things IS NOT NECESSARY to bind the government, it is enough if these details were a part of his normal week-in week-out functions while assigned at the campus at Laramie, and if he performed these functions during duty hours with valid trip ticket and with the express authority of his Commanding Officer.*

The opinion having dismissed Williams' written request to re-appear for examination as not having been an order,[2] the opinion continues to search for orders—

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[1]If a master-sergeant, a sergeant-major of a detachment, can be said to be a staff-sergeant's superior officer, then this statement is not true. Williams was told by the sergeant-major to pick up his insurance policy while in Cheyenne for the examination.

[2]Interesting in this regard is the evidence of one Major Kenneth Van Reichter Parks, who testified: "I may request an enlisted man to do something, but he realizes it's an order!"

and even instructions—regarding his performance of usual errands for himself and others of his detachment. Finding none, the opinion announces that "it cannot be said by the application of any process of logical reason that Sergeant Fred S. Williams made the trip from Laramie to Warren Air Force Base in response to an order of the military establishment, or in the course of the scope of his employment." Thus, the Circuit Court carried a fixation throughout this opinion that if no order could be found, no liability could ensue. This hovers over the entire opinion. The premise is completely invalid, as is evidenced, by the following Federal Tort Claims Act cases from various circuits and districts, in all of which there were no express or letter or oral or written orders of any kind; judgments were rendered according to the doctrine of respondeat superior by the application of *all* of the several tests of that doctrine:

Murphey v. United States 179 F. 2d 743, 9-Cir., in which the soldier had mere oral permission only to drive the car in seeking entertainment.

United States v. Wibye 191 F. 2d 181, 9-Cir., in which the soldier had neither permission nor order to leave his normal route to dine with his mother, but had instructions to drive the car.

McConville v. United States, 197 F. 2d 680, 2-Cir. No order of any kind issued, and the soldier had mere permission from motor pool to drive the government vehicle.

United States v. Holly-Saunders 192 F. 2d 221, 10-Cir. The record does not contain evidence of orders of any kind having been issued. That a national guard employee was driving a government unit, owned by the United States, during duty hours, was apparently sufficient evidence of his "line of duty" status.

Roger v. Elrod and United States, 125 Fed. Supp. 62 (Alaska, 1954). Soldier had oral permission to drive the car. No orders of any kind were issued.

Satterwhite v. Bocelato-United States 130 Fed. Supp. 825 (No. Caro., 1955). No orders were issued, there were oral permissions only given to the driver.

We submit there is no judicial precedent for the proposition that liability cannot ensue for the alleged tort of a soldier unless his superior has specifically ordered the doing of that act out of which grew the cause of action. Surely the above decisions are ample proof to the contrary.

THE DECISION VIOLATES THE EXPRESS TERMS AS WELL AS THE SPIRIT OF THE FEDERAL TORT CLAIMS ACT

The Circuit Court opinion enumerates each instant of delay indulged in by Williams on the afternoon of his visit to Cheyenne. It recites from his testimony his various visits to the post exchange, to downtown Cheyenne and back to the exchange, in waiting for the insurance policy. It then concludes that "some seven and a half, or eight hours on July 1, 1953, between the termination of his physical examination at Warren A.F.B. and the time of his departure for Laramie were spent either in leisure or in the pursuance of private and personal objective of Williams."

Ths is another example of the "military" type test put to this case by the Circuit Court of Appeals, instead of trying it under the Federal Tort Claims Act. The law is clear that under the general master and servant doctrine the wasting of time in the performance of an authorized act most certainly does not preclude responsibility of the employer. *Restatement of Agency,* § 229, 230; *Seals v. Sanders,* 29 Cal. (2nd) 834, 839; See General

Tests of Agency as to master-servant relationship, as contained in 57 *Corpus Juris Secundum* 300.

The importance of the position taken by the Tenth Circuit in this case becomes acute when liability is analyzed under normal master-servant principles. These principles obviously were intended by Congress to be applied in determining the issue of scope of employment when it provided in § 2674 that the government should be liable "in the same manner and in the same extent as a private individual under like circumstances."

Normally the issue of scope of employment is determined by considering the "circumstances" surrounding the tortious act. Thus, as set forth in *Restatement of Agency*, § 229, it is important to consider many factors, among them whether or not the act is *commonly* done by such servant, the time, place and *purpose* of the act, *previous* relations between the master and servant, whether or not the instrumentality by which the harm has been done was furnished by the master to the servant and other factors. Under normal Agency law, even forbidden and criminal acts may be within the scope of employment. *Restatement of Agency*, § 230, 231. Furthermore, an additional Restatement test (§ 220) is whether or not the parties *believe* they are creating the relationship of master and servant.

The Tenth Circuit Court opinion searches hard and cannot find that an order of the military establishment issued to Williams to do what he did that day. It is submitted that the law governing this case is not whether or not an order was issued, but is an application of the tests of the doctrine of respondeat superior according to its development in Wyoming cases, all of which approve the general law of the land in this regard. One of these Wyoming tests is *in whose interest* was the young man performing on the day of the accident. The second is

whether or not any *relinquishment* of that standard of *control, direction* and *supervision* previously exercised upon Sergeant Williams on his prior trips had been made on the day of the accident.

The Tenth Circuit Opinion failed to apply these normal rules to the facts. Apparently only if the tortious act is specifically authorized by the military establishment in the form of a direct order may the government be liable. This error should not stand.

Sergeant Williams followed the normal channels and procedures in drawing his vehicle on the morning of July 1, 1953, and he proceeded to carry out errands regarding the purchase of supplies for members of his detachment and himself, which he had done on many numerous occasions. It is admitted that he committed no violation of military regulations or orders of any kind; that he was not on pass or furlough or on leave; and that he was on official business. This latter admission was made by no less an official of the Armed Forces than the Assistant Secretary of Defense.[3]

In the face of such facts, the Circuit Court opinion that the soldier was "in the furtherance of his personal business" and thus "not in line of duty" should not stand. This was personal business in the sense that Sergeant Williams no doubt wanted to improve himself in the

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[3]Mr. John A. Hannah. Included in many points upon which applicant relied on appeal to the Tenth Circuit was a ruling of trial court refusing in evidence a letter from Mr. Hannah, received by applicant's husband, which stated that an Air Force investigation had taken place and that the Air Force Staff car driver was on official business with valid trip ticket and proper driver's license. It was offered to show the intent of the employer regarding the master-servant relationship, and as bearing upon Sergeant Williams' status the day of the accident, and to show that the Air Force considered him to be on official business and in line of duty. The propriety of the ruling was ignored by the Circuit Court.

service. It was also the government's business in the obvious sense that the government was interested in his candidacy, otherwise the government would not have:

1. Provided him with an Air Force vehicle clearly marked "For Official Use Only."
2. Permitted the issuance of a specific trip ticket authorizing express transportation for that day from Laramie to Warren A.F.B., Wyoming.
3. Permitted the trip during a full duty-day, without so much as the issuance of a pass, or leave.
4. Made telephonic appointments and set up examining Boards of Commissioned Officers to receive him at Warren A.F.B. July 1, 1953.

Marquardt, et ux. v. United States, 115 F. Supp. 160, cites with approval *United States v. Wibye* 191 F. 2nd 181, 9-Cir., on the principle—ignored in the opinion—that one may be furthering the official purposes of his employer while engaged in advancing his own career. "When a servant is combining his own business with that of his master, or tending to both at substantially the same time, no fine distinction will be made on the basis of whether business which servant was actually engaged in when served person was injured was that of his own or that of his master, but master will be held responsible. unless it clearly appears that servant could not have been directly or indirectly serving his master."

For these reasons, your applicant feels the decision should not stand.

II

THE TENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT WYOMING QUESTION IN A WAY IN CONFLICT WITH APPLICABLE STATE LAW.

It is now clear that all circuits will test the scope of employment aspect of Federal Tort Claims by the application of the law of respondeat superior of the jurisdiction where the alleged tort occurred. *Williams v. United States,* 350 U.S. 857. The Circuit Court states that there is a dearth of authority on the question in Wyoming, but that "such cases as have been decided by the Supreme Court of Wyoming are in harmony with the body of the Federal Case Law and the general rules prevailing among the various states of our Union." The decision then summarized Wyoming law with the observation that it "could not find in any Wyoming decision a law which would impose liability on a principle for the acts of his agent occuring when the latter was in the furtherance of his personal business," *thus foreclosing your petitioner from a consideration of the very matter on appeal, precisely whether or not the sergeant was engaged in personal business or in a business serving himself and his principle!*

The Wyoming case of *Blessing v. Pittman,* 70 Wyo. 416, 251 P 2nd 243, is cited as holding that the two main Wyoming tests are *in whose business was the servant engaged at the time of the accident,* and that *there must be a relinquishment of exclusive control over the servant before the master is relieved from liability.* The only other Wyoming case of importance is *Stockwell v. Morris,* 46 Wyo. 1, 22 P 2d 189, a Maytag Washing Machine-traveling-salesman type case and Wyoming's initial opinion on the law of "independent contractor."

The *Blessing* case established the Wyoming "borrowed servant doctrine" and its facts involve a collision of a truckload of horses into the back of an unlighted circus wagon being driven by a driver-servant of the owner of the wagon. Thus since Williams is hardly an independent contractor or a borrowed servant, the general law of respondeat superior which the Wyoming Court quotes with considerable approval should, in addition to the rules these cases set forth, be considered by a court of review. Although the Circuit Court opinion states Wyoming's decisions on respondeat superior "are in harmony with the body of the Federal Case Law and the general rules prevailing . . ." not one single Federal Tort Claims case is discussed or distinguished in support of its judgment; and except for the "control" and "in whose business" rule, not one single test of the general law of respondeat superior or of the Restatement of Agency was applied to the facts of this case, or are they so much as commented upon in the Circuit Court opinion. Furthermore its author fails to *apply* the two Wyoming tests, holding that all of Williams' actions were *entirely voluntary*[4] on his part.

To apply the tests readily reveals otherwise. Was exclusive control over Williams relinquished on July 1, 1953? He was not on pass, on leave, nor was he given the day off. He was on full-duty time, performing acts often performed in driving the same vehicle to the same destination and back, with the same type valid trip ticket, for the same post-exchange buying privileges, and for all of which he had the specific authorization of his commanding officer. Furthermore he was carrying out "requests," as the Circuit Court opinion puts it, of higher

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[4]This in the face of evidence that his failing to appear at Warren Air base for his scheduled examination would have resulted in a military reprimand from his officer in charge.

command regarding appearing for an appointment before Officer Candidate Boards.

As for the "in whose business" test, if Williams was on a mission *all* his own, or attending only to the furtherance of his personal business, one need only ask why, therefore, had his commanding officer, a lieutenant colonel, made the appointment for him? Why had he been supplied with a government staff sedan and a special trip ticket issued for this trip? Why had official franked letters gone through the mail from two Air Force installations—Lowry A.F.B. in Denver—Warren A.F.B. in Cheyenne—to the University R.O.T.C. detachment in Laramie regarding his application? Why were examining boards convened at Warren on July 1, 1953, if the soldier's business was purely personal?

To have all such factors completely ignored in an opinion by a Circuit Court of the United States is not proper and should be reviewed.

The opinion states that Williams' original objective was securing of further medical attention. The evidence is unquestionably otherwise. Williams did not request in any way his further, or second physical examination which brought him to Cheyenne on July 1, 1953. It was set in being by an official communication from a Processing Squadron Chief of Lowry Air Base, Denver, a captain, to Williams, a sergeant, at the University R.O.T.C. detachment at Laramie, and by a second letter over the authority of a captain of the Headquarters of a Technical Training Wing Officer Training School Examination Board at Warren A.F.B., Cheyenne, to Sergeant Williams, requesting him to return to Cheyenne for the correction of administrative details regarding his physical defect.

The opinion limits Williams' duties to a specific few, and states that they could not be enlarged upon except

by specific orders of his commanding officer. It says nothing regarding inherent duties as a soldier in the Armed Forces enlarging upon the filing of his application, to include prompt and punctual compliance with any request made of him by any higher officials regarding that application. HIS APPLICATION MAY HAVE BEEN "HIS MISSION" OR "HIS BUSINESS" WHEN FILED, BUT WHEN ACCEPTED BY THE ARMED FORCES, THEY PLACED INTO MOTION MACHINERY OF THEIR OWN PROCESSING SQUADRONS, TRAINING W I N G S, OFFICER CANDIDATE BOARDS, AND BASE HOSPITAL EXAMINERS. AT THAT TIME "HIS MISSION" BECAME THEIR MISSION; HIS BUSINESS THEIR BUSINESS. AN OPINION SO VOID OF EVEN CONSIDERING THESE REALITIES REQUIRES REVIEW.

Wherefore, your petitioner prays that a writ of certiorari issue to the Court of Appeals for the Tenth Circuit, to the end that the mistaken opinion aforesaid may be corrected by this Court.

Dated, Cheyenne, Wyoming, September 8, 1956.

Respectfully Submitted,
Teno Roncalio
Attorney for Petitioner

(Appendix A follows)

Appendix A

United States Court of Appeals
Tenth Circuit

May Term, 1956

Josephine Leonard, Appellant, v. The United States of America, Appellee.	No. 5267
A. Joseph Williams, Administrator of the Estate of Cora Mae Leonard, deceased, Appellant, v. The United States of America, Appellee.	No. 5268

(June 23, 1956)

Appeals from the United States District Court for the District of Wyoming

Teno Roncalio for appellants,

John G. Laughlin, Attorney, Department of Justice, for appellee.

Before BRATTON, Chief Judge, PHILLIPS, Circuit Judge, and ROGERS, District Judge.

ROGERS, District Judge.

The two causes here on appeal involve common questions of law and fact, were consolidated for trial by the trial court, and the appeals are before us on a consolidated record. Both cases were brought against the United States, under the Federal Tort Claims Act, 28 U.S.C.A. 1346 (b), and 2671, et seq., the first seeking damages for personal injuries to Josephine Leonard, the second for damages for the death of Josephine Leonard's minor daughter, Cora Mae Leonard, said to be caused by the negligence of an agent, servant and employee of appellee, acting within the scope of his employment.

The accident, from which proximately flowed the injuries and death, resulted from a collision between the vehicle owned and operated by appellant Josephine Leonard, and a vehicle owned by the United States and operated by one Frederick S. Williams, then a Sergeant of the United States Air Force assigned to duty with the AFROTC Detachment at the University of Wyoming. The situs of the collision was U. S. Highway Number 30, which runs in an Easterly-Westerly direction between Laramie and Cheyenne, Wyoming. The collision occurred July 1, 1953.

The lower court rendered judgment for the United States of America on the theory, first, that the driver of the government vehicle was not acting within the scope of his employment at the time of the accident, and secondly, that the appellants are barred from recovery as a result of the application of the doctrine of contributory negligence. Inasmuch as our ruling as to the first point is dispositive of the case, we will not consider the questions of negligence and contributory negligence.

The pertinent portions of applicable sections of the Federal Tort Claims Act, are as follows:

"Section 1346. United States as defendant.

• • • • •

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

• • • • •

Section 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

• • • • •

Section 2671. Definitions.

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

• • • • •

'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

'Acting within the scope of his office or employ-

> ment,' in the case of a member of the military or naval forces of the United States, means acting in line of duty."

It will be seen from reading the above statutes that liability on the United States, under the Federal Tort Claims Act can only be predicated when the negligence of a government employee occurs while "acting within the scope of his office or employment". Section 1346(b), supra.

In order to determine whether Sgt. Williams was acting within the scope of his office or employment, some detail in the recitation of the facts concerning his status, activities and movements at the time surrounding the accident, is required.

For some months preceding the accident, Williams was a member of the United States Air Force, and assigned to the Air Force ROTC Detachment at the University of Wyoming, in Laramie. His duties with the Air Force consisted, in the main, of administrative work at the Detachment, keeping the records of the students enrolled in ROTC work, performing some services as a Drill Sergeant, and in teaching of classes in Air Force administration and supply. Permission, at times, was given enlisted personnel, including Williams, to use the Air Force vehicle to go to the Warren Air Force Base near Cheyenne, Wyoming, for supplies and for Post Exchange items, the latter being bought at the personal behest of other enlisted personnel. In the month of May, 1953, Sgt. Williams submitted an application for Air Observer training. This application was submitted to the Aviation Cadet Examining Board at Warren Air Force Base, Cheyenne. A notice that such applications would be received was distributed through Air Force channels to various units, including that stationed at the University of Wyoming. It is well, here, to state that general public-

ity to this activity was had through various civilian publications. Applicants were by no means limited to military personnel, and civilians were invited to apply for this training. The evidence indicates that the greater part of the applicants were civilians, rather than members of the Armed Forces. Sgt. Williams was not ordered to apply for this training, but did so of his own volition, having in mind the ultimate personal reward to him of a commission as an officer in the Air Force of the United States. A physical examination was required in the course of processing Williams' application. Prior to the date of the accident, he had submitted himself voluntarily for such a physical examination at the Air Force Base. On June 23, 1953, Sgt. Williams received, through channels, a written notification that his application for Air Observer training had been returned from Lowry Air Force Base near Denver, Colorado, to Warren Air Force Base "for physical reasons". Williams was requested in that notification to return to the base at his convenience, to have these defects taken care of. On the date of the tragic accident, July 1, 1953, Sgt. Williams left Laramie, Wyoming, at about 7:00 o'clock in the morning, in a government-owned vehicle which was assigned to the Detachment, of which Williams was a member. He had the consent of his Commanding Officer to go that day to Cheyenne, and likewise had his Commanding Officer's consent to drive the vehicle in question. He went from Laramie to the hospital unit at the Warren Air Force Base, where he reported for and received an X-ray examination. This examination was concluded at approximately half past nine that morning. Williams thereupon went to the Recruiting Board at the Warren Air Force Base, and had a discussion with a Sergeant there, concerning his application. Following this conference, he went to the Base Post Exchange, drank a cup of coffee, purchased a pack of cigarettes and made enquiries of some

civilian clerks in that establishment concerning some film for Williams' camera. Before leaving on this trip, Sgt. Williams had agreed with a fellow enlisted man that he would, in Cheyenne, pick up an AAA automobile insurance policy which was to be issued in favor of his fellow comrade in arms. The insurance agent informed Williams that the policy had not at that time been completed, and Sgt. Williams was asked to return to the office of the insurance agent at some time after lunch on that day. Williams thereupon went back to the Warren Air Force Base for lunch. Thereafter returning to Cheyenne at approximately 1:00 o'clock in the afternoon, he was again informed that the policy was not ready for delivery to him. He left the insurance office, returned once again to Warren Air Force Base, and returned to Cheyenne in the middle of the afternoon, where he at last received the policy. He decided to make a further trip to the Warren Air Force Base Post Exchange. At that time he purchased some Tee shirts, some hair oil and some other toilet articles, and eventually departed from the Warren Air Force Base for his home station at Laramie, bteween 4:30 and 5:00 o'clock that afternoon. The accident out of which these suits have grown, occurred at 5:45 p.m., at a point between 35 and 40 miles West of the City of Cheyenne.

The above recitation of facts, we believe, fairly states the circumstances pertaining to Williams' status and his actions on July 1st, 1953. They are in harmony with the Findings of Fact made by the trial court, and there is ample and substantial evidence to support these facts. We must now determine whether, under the above state of facts, Williams was acting within the scope of his office or employment at the time he is charged with having negligently caused the accident and ensuing injuries and death herein.

The question of whether the alleged negligent acts

by a government employee occurred while said agent was acting within the scope of his office or employment is to be determined by the settled law relative to the doctrine of respondeat superior of the jurisdiction where the alleged negligent acts occurred. See Williams v. U.S., 350 U.S. 857. In that case certiorari had been granted to the Court of Appeals for the Ninth Circuit. The Ninth Circuit Court of Appeals has held that the Federal Law governed the rule of respondeat superior. In a brief per currium opinion, the Supreme Court of the United States held, in effect, that the case was controlled by the California doctrine of respondeat superior, rather than by the body of Federal Law on that question. The decision of the Court of Appeals was thereupon vacated and remanded for further consideration and disposition in the light of the California doctrine.

In view of the Supreme Court's decision just mentioned, we must make enquiry to determine what has been decided by the Supreme Court of the State of Wyoming, relative to the law of respondeat superior. A search of that State's case law reveals that there is a dirth of authority on the question, but such cases as have been decided by the Supreme Court of Wyoming, are in harmony with the body of the Federal Case Law, and the general rules prevailing among the various States of our Union.

Summarizing the Wyoming law from a negative standpoint, we can state that no enunciation has been made by Wyoming courts, the effect of which is to impose a liability on a principal for the negligent acts of his agent occurring when the latter was in the furtherance of his personal business or to use the phrase of the learned trial court, on a "mission of his own". The doctrine of respondeat superior has received the specific attention of the Supreme Court of Wyoming in two cases, Stock-

well v. Morris, 46 Wyo. 1; 22 P(2) 189, and Blessing v. Pittman, 70 Wyo. 416, 251 P(2) 243.

In the Stockwell case, one Morris was a salesman for the Maytag Intermountain Company. He was driving his own personal automobile from Hudson to Lander, Wyoming, and collided with the automobile of the plaintiff. Morris had worked on a commission for the Maytag Company, made his own schedules for his salesmanship activities, came and went as he pleased, made certain adjustments and repairs to the washing machines and himself worked out the details of his customer relationships. The Wyoming court, in affirming an order of the trial court granting a directed verdict to the defendant Maytag Intermountain Company, went with meticulous and thorough detail into the law of agency, as it applies to torts, specifically recognized the general rules of respondeat superior and formulated a lodestar for Wyoming jurisprudence in this regard. In effect, that court held that it is the modern doctrine that a master is responsible for the torts of his servant, committed within the scope of his employment. It then went on to state that there are many cases in which a man should not be held responsible for the acts of a representative, if the latter is not under his immediate control, direction or supervision. This discussion was crystallized with the ultimate ruling that if the right of control is the test, then it ought to be directed to that portion of the employment directly connected with the factor by reason of which liability is sought to be enforced.

The last case on this problem, Blessing, supra, involved an action for damages to a truck and the horses being transported therein, from a collision with the rear of an unlighted circus wagon being hauled on a Wyoming highway at night, without those lights which are required by Wyoming statute. There the truck was owned by the defendant, and operated by the driver-servant

who was otherwise in the general employment of the defendant. Inasmuch as circuses are, by their nature, nomadic in nature, the circus was no doubt out of the jurisdiction of Wyoming at the time suit was brought. The plaintiff thereupon sought damages from the truck owner who was hired by the circus to transport the latter's vehicles to the site for the performance of the following day. The Supreme Court held that under the circumstances shown, the driver of the truck was in the general employ of the defendant, rather than being the special servant of the circus operator, and that therefore the defendant was liable for the driver's negligence. While this case dealt specifically with the "borrowed servant doctrine", the general law of respondeat superior was discussed and the Stockwell case was cited. The two tests applied by the Wyoming court in the Blessing case was, first, who had control over the servant, and secondly, in whose business was the servant engaged at the time of the accident. Emphasizing the latter test, the court held that the servant was engaged in the transportation of goods and vehicles by motor vehicle on the highways, and that this was the activity of his master, the defendant Pittman.

The scope of the office or employment of Sgt. Williams was that of a non-commissioned officer in the Air Force ROTC Detachment, assigned to the University of Wyoming. His duties, as stated above, were administrative and of a training nature. Any other activities of Williams would have to be performed as additional specific duties following an order of his Commanding Officer. The record in this case is entirely devoid of any evidence indicating an order or an instruction given Williams by his superior officers or his Commanding Officer, requiring Williams to purchase goods at the Post Exchange, or to pick up the automobile collision and liability policy for his fellow enlisted man. The evidence is uncontradic-

ted that any steps taken by Williams regarding Air Observer training, and including the making of his application, the taking of his original physical examination, and likewise going to the Warren Air Force Base for further examinations of a physical nature, were entirely voluntary on the part of Williams, and were done for that individual's own personal convenience and advancement in the military field. The notification to Williams that his application had been returned from Lowry Base to the Warren Base was informative, only, and contained a request, not an order, that Williams should, at his convenience, go to the Warren Air Force Base Hospital for a further examination and treatment. As has been stated in another part of this opinion, the Air Observer program was made available alike to military and civilian personnel, was possibly emphasized to the latter category. It cannot be said by the application of any process of logical reason, that Sgt. Fred S. Williams made the trip from Laramie to Warren Air Force Base in response to an order of the military establishment, or in the course of the scope of his employment. Some seven and a half or eight hours of July 1st, 1953, between the termination of his physical examination at the Warren Air Force Base and the time of his departing for Laramie, were spent either in leisure, or in the pursuance of private and personal objectives of Williams. His original objective, that of securing further medical examination being voluntary on the part of Williams, and the balance of his activities being purely of a personal nature, it cannot be said that at the time of the accident, or at any time while Williams was on the trip in question, he was acting within the scope of his office or employment. Being so engaged on a personal mission, or a mission of his own on the day and time in question, the United States of America can-

not be liable to either of the appellants herein, under the well-known doctrine of respondeat superior.

Accordingly, the judgments of the lower court are AFFIRMED.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 510

JOSEPHINE LEONARD,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Tenth Circuit

TO: The Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States.

Petitioner Josephine Leonard having heretofore filed her Petition for Writ of Certiorari to review the judgments against her in the United States District Court for the District of Wyoming and in the Tenth Circuit

Court of Appeals, as is more fully set forth in said Petition, does hereby respectfully request that said review include the case of A. Joseph Williams, Administrator, v. the United States of America.

The cases of Josephine Leonard, Plaintiff and Appellant, v. United States of America, Defendant and Respondent; and A. Joseph Williams, Administrator of the Estate of Cora Mae Leonard, Deceased, Plaintiff and Appellant; v. the United States of America, Defendant and Respondent, were consolidated for purposes of trial in the District Court below. Following entry of judgments against the Plaintiff in both cases, said cases were consolidated for purposes of appeal, and the adverse judgment in both cases was a single judgment rendered by the Tenth Circuit.

Your Petitioner thereupon omitted the name of the second case from the caption of the Petition for Writ of Certiorari filed herein, in the apparently questionable belief that said second caption was redundant due to the action below consolidating said cases, and due to the rendering of a single judgment affecting both cases below.

Your Petitioner therefor respectfully prays that the review now sought include both cases, and files this Supplement to Petition for Writ of Certiorari filed herein, seeking review of the latter case as well as the former.

Dated, Cheyenne, Wyoming, November 27, 1956.

Respectfully Submitted,

Teno Roncalio
Attorney for Petitioner